

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON ALLEN TYE,

Defendant-Appellant.

UNPUBLISHED

April 10, 2014

No. 313095

Macomb Circuit Court

LC No. 2011-004478-FH

Before: DONOFRIO, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of assault with a dangerous weapon, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

This case arises from a verbal altercation between defendant and Ryan Kilburn, who was engaged to defendant's former girlfriend, which escalated into a physical altercation and, eventually, defendant retrieved a pistol from his vehicle and pointed it at Kilburn.

On appeal, defendant argues that he was denied the effective assistance of counsel because his attorney failed to impeach Kilburn with inconsistent statements and failed to object to the prosecutor's improper bolstering of Kilburn's testimony. We disagree. Our review is limited to errors apparent on the record because a *Ginther*¹ hearing was not held. See *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

"To prevail on a claim of ineffective assistance of counsel, defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) the resultant proceedings were fundamentally

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

unfair or unreliable.” *People v Brown*, 294 Mich App 377, 387-388; 811 NW2d 531 (2011). There is a strong presumption that trial counsel’s action was sound trial strategy. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). An attorney’s decisions regarding what evidence to present, what questions to ask witnesses, and whether to make an objection are presumed to be matters of sound trial strategy. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008); *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Here, defendant argues that his counsel was ineffective for failing to impeach Kilburn with prior inconsistent statements he apparently made to the police. However, defendant has failed to set forth any inconsistent statement made by Kilburn that counsel should have confronted him with at trial. To the contrary, defendant actually identifies several examples of counsel impeaching Kilburn on cross-examination. For example, counsel brought up a past statement made by Kilburn to Officer Dean Toward that defendant had punched him during the altercation, rather than swinging the pistol at him. Counsel also questioned Kilburn regarding apparent inconsistencies regarding what defendant allegedly said immediately before retrieving the gun from his car; Kilburn had told Officer Toward that defendant had said, “what’s up now,” but he testified that defendant had said, “I got something for you.” Defendant also claims that there are “other inconsistencies” that counsel attempted to elicit from Officer Toward, rather than from Kilburn himself, but defendant fails to identify any such inconsistencies. “An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims.” *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998). Accordingly, defendant has failed to establish that he was denied the effective assistance of counsel because his attorney allegedly failed to properly impeach Kilburn with prior inconsistent statements.

Defendant also argues that his counsel was ineffective because he failed to object to the prosecutor’s improper bolstering of Kilburn’s testimony and refers us to two instances in which he claims an objection was required. First, counsel failed to object when the prosecutor asked a testifying police officer whether Kilburn’s testimony about the felonious assault differed from the details he had reported to the officer. This question, however, did not imply any special knowledge not known to the jury; thus, the prosecutor did not engage in improper bolstering of Kilburn’s testimony. A “prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness’ truthfulness.” *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Second, defendant argues, counsel failed to object to the prosecutor’s closing argument which bolstered Kilburn’s testimony when the prosecutor explained that Kilburn did not think to immediately call the police and “[h]e didn’t lie about that.” Again this statement does not constitute improper bolstering. It was clear from the record evidence that Kilburn did not immediately call the police after the assault. The prosecutor did not imply that he had any special knowledge in that regard; rather, he merely referred to the known evidence. Counsel is not required to make futile or frivolous objections. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Accordingly, defendant has failed to establish that he was denied the effective assistance of counsel in this regard.

Moreover, even if counsel's performance fell below an objective standard of reasonableness in these two instances, in light of the record evidence, defendant has failed to establish there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different and the resultant proceedings were fundamentally unfair or unreliable. See *Brown*, 294 Mich App at 387-388.

Affirmed.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen